No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a state offense that criminalizes continued unlawful presence in a dwelling following the formation of intent to commit a crime has "the basic elements of unlawful * * * remaining in * * * a building or structure, with intent to commit a crime," *Taylor* v. *United States*, 495 U.S. 575, 599 (1990), thereby qualifying as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 850 F.3d 836. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 634 Fed. Appx. 578.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017. A petition for rehearing was denied on June 28, 2017 (Pet. App. 9a-10a). On September 15, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 24, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Michigan, petitioner

was convicted on one count of unlawful possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 204 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. On August 24, 2013, petitioner held his girlfriend, Chasity Warren, at gunpoint. Presentence Investigation Report (PSR) ¶¶ 7-8. Petitioner had just been released on parole following a prison sentence for shooting someone in Saginaw, Michigan, and he had assaulted Warren and threatened to kill her mother following his release. PSR ¶¶ 8-9. On the date in question, petitioner had taken Xanax pills and was unable to drive; he became angry and verbally abusive toward Warren when the car she was driving ran out of gas. PSR ¶ 10. Warren hailed a cab that took the pair to a gas station, where Warren locked herself in a bathroom. PSR ¶ 11. When Warren emerged, petitioner took her by the arm back to the car. *Ibid.* Petitioner, who had assumed control of the vehicle, grew angrier and struck Warren in the face. PSR ¶ 12. Warren asked to leave the car when petitioner stopped at a McDonald's restaurant, but petitioner physically prevented her from doing so. PSR ¶ 13.

Petitioner drove to his house where he "continued to yell at [Warren] and refused to let her leave." PSR ¶ 14. At one point, petitioner aimed a handgun at Warren's head, stating "You want to go to a wedding or a funeral?" *Ibid.* Petitioner then accused Warren of seeing other men. *Ibid.* Warren eventually fled the house and called 911. PSR ¶ 15.

Officers arrived at the scene and arrested petitioner, who had attempted to leave in a vehicle. PSR ¶ 15. During a protective sweep of petitioner's house, officers saw a .45-caliber semiautomatic pistol with six rounds of ammunition in the magazine. PSR ¶ 16. A subsequent forensic examination confirmed that DNA on the pistol's handgrip belonged to petitioner. PSR ¶ 18.

Upon further investigation, law enforcement learned that Layassa Moore, petitioner's ex-girlfriend, had filed a police report alleging that petitioner had recently visited her residence and demanded to see her children. PSR ¶¶ 19-21. When Moore had begun to argue with petitioner, he had pulled a gun from his waistband, pointed it at Moore, and told her not to argue with him as he proceeded upstairs into the residence. PSR ¶ 21.

2. A federal grand jury charged petitioner with one count of unlawful possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). PSR ¶¶ 1-2. Petitioner pleaded guilty. PSR ¶ 4.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm following a felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense," 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

The Probation Office determined that petitioner had three prior convictions under Michigan law that qualified as "violent felon[ies]" for purposes of the ACCA: (1) a 2002 conviction for third-degree home invasion; (2) a 2004 conviction for assault with a dangerous weapon; and (3) a 2008 conviction for felonious assault. PSR ¶¶ 40, 51, 54, 56. The Probation Office calculated petitioner's guidelines range at 188 to 235 months. PSR ¶¶ 40, 61, 103.

Petitioner objected to application of the ACCA, arguing that his prior conviction for third-degree home invasion did not constitute an ACCA predicate. D. Ct. Doc. 29, at 5-20 (Jan. 21, 2015). The district court overruled the objection. It held that the offense qualified under the ACCA's "residual clause" because the statute of conviction "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii); see 2/13/15 Sent. Tr. (Sent. Tr.) 16-22. The court then adopted the Probation Office's recommended guidelines range and sentenced petitioner to 204 months of imprisonment, above the 180-month mandatory minimum ACCA sentence, to be followed by five years of supervised release. *Id.* at 30-31, 39-43. Referencing the discretionary sentencing factors under 18 U.S.C. 3553(a), the court concluded that petitioner was "the paradigm picture for somebody * * * that should fall within the [ACCA], because in many ways on multiple occasions he's demonstrated that there's a very dangerous mix for [petitioner]: Firearms, a former girlfriend, and drugs and alcohol." Sent. Tr. 39.

3. Following petitioner's sentencing, this Court held in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague. *Id.* at 2557. In light of *Johnson*, the court of appeals vacated petitioner's sentence and remanded the case to

the district court to determine whether petitioner's prior conviction for third-degree home invasion qualifies as an ACCA predicate because it constitutes the enumerated offense of "burglary." 634 Fed. Appx. at 579. Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the "generic" term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

4. On remand, the district court held that petitioner's prior conviction for third-degree home invasion was "the functional equivalent of generic burglary." 5/16/16 Resent. Tr. 23 (Resent. Tr.). As relevant here, the court rejected petitioner's argument that the Michigan offense —which punishes, among other things, instances in which an individual "breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor," Mich. Comp. Laws Ann. § 750.110a(4) (West Supp. 2001)—lacks the intent requirement of generic burglary. See Resent. Tr. 21-22. The court explained that the Michigan statute envisions a "specific-intent state crime," in that "the intent [must be formed] at the time of entry * * * or while still remaining in an unprivileged access in the house or in the structure." *Id.* at 22. The court remarked, "I don't see how you could have a specific-intent crime committed while residing or remaining in an unprivileged entry status and not satisfy what [*Taylor*] describes as generic burglary." *Ibid.*

The district court accordingly overruled petitioner's objection to his ACCA designation, adopted the same

188-to-235 month advisory guidelines range, and reimposed a 204-month term of imprisonment, to be followed by five years of supervised release. Resent. Tr. 23-24, 32. The court again cited petitioner's history of "visit[ing] violence on people * * * close to him with guns while on supervision," which, the court observed, was "exactly the kind of danger that * * * we're meant to address when the ACCA applies." *Id.* at 31-32; see *id.* at 30 (noting petitioner's "long list of trouble" and the "volatile mix of the drugs, the anger, the violence, and usually an ex-girlfriend, sometimes a present girlfriend").

5. The court of appeals affirmed. Pet. App. 1a-8a. The court rejected petitioner's argument that generic burglary includes "an intent-at-entry element," under which the defendant must form the requisite intent at the moment of unlawful entry. *Id.* at 7a-8a. The court cited *Taylor*'s definition of generic burglary, which includes the "unlawful or unprivileged entry into, *or remaining in*, a building or structure, with intent to commit a crime." *Id.* at 8a (quoting *Taylor*, 495 U.S. at 598). Although the court noted disagreement in the circuits about "whether generic burglary requires intent at entry," *id.* at 7a, it adhered to its prior decision holding that a similar Tennessee burglary statute satisfies the "remaining in" variant of generic burglary, see *id.* at 8a. The court explained that "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have," for purposes of *Taylor*, "remained inside the building or structure to do so." *Ibid.* (quoting *United States* v. *Priddy*, 808 F.3d 676, 685 (6th Cir. 2015), abrogated on other grounds by *United States* v. *Stitt*, 860 F.3d 854 (6th Cir. 2017), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017)). The court accordingly reasoned that "generic burglary,

as defined in *Taylor*, does not require intent at entry; rather the intent can be developed while 'remaining in.'" *Ibid.* (quoting *Taylor*, 495 U.S. at 598).

The court of appeals denied petitioner's request for rehearing en banc. Pet. App. 9a-10a.

DISCUSSION

The court of appeals correctly rejected petitioner's argument that a defendant commits "generic" burglary, as defined in *Taylor* v. *United States*, 495 U.S. 575 (1990), only if he has already formed the intent to commit a crime when he unlawfully enters or initially remains in a building or structure. The question presented, however, has divided the courts of appeals. The Court's review is warranted to resolve this frequently recurring question regarding the scope of an important ACCA predicate.[1] In the alternative, this Court may wish to hold the petition in this case pending its disposition of the government's petition for a writ of certiorari in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017), which may illuminate the proper scope of "burglary" under the ACCA.

1. The court of appeals correctly determined that a conviction under the Michigan third-degree home-invasion statute constitutes a conviction for "generic" burglary under a straightforward application of *Taylor*.

In *Taylor*, this Court held that Congress intended "burglary" in the ACCA to have a "uniform definition." 495 U.S. at 580; see *id.* at 591-592. The Court declined to adopt the common law's definition of burglary—"'the

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[1] Two other pending petitions for writs of certiorari present the same question. See *Ferguson* v. *United States*, No. 17-7496 (filed Jan. 17, 2018); *Secord* v. *United States*, No. 17-7224 (filed Dec. 19, 2017).

breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony'"—because that narrow definition "ha[d] little relevance to modern law enforcement concerns" that animated the ACCA. *Id.* at 580 n.3, 593 (citation omitted). The Court instead adopted a broader construction of "burglary" that encompasses any "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. *Taylor* further held that the ACCA generally requires a "categorical approach" to determining whether or not an offense constitutes a "violent felony." *Id.* at 600. Under that approach, sentencing courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." *Ibid.*

The court of appeals correctly determined that petitioner's conviction for third-degree home invasion under Michigan law satisfies *Taylor*'s definition of "burglary." Section 750.110a(4)(a) provides that

> A person is guilty of home invasion in the third degree if the person * * * [i] [b]reaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, [ii] enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or [iii] breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Mich. Comp. Laws Ann. § 750.110a(4)(a) (West Supp. 2001). As interpreted by the lower courts, to commit that offense, petitioner necessarily had to form the requisite intent to commit a misdemeanor either before he entered the dwelling or while he was still inside. Even

if the intent was formed after petitioner entered, his offense satisfied *Taylor*'s definition of "burglary" because petitioner, like anyone violating Section 750.110a(4)(a), entered the dwelling unlawfully and "remain[ed]" there "with intent to commit a crime." *Taylor*, 495 U.S. at 599.

Petitioner objects (Pet. 20-27) to that application of *Taylor* because the Michigan home-invasion statute does not require that the defendant have the intent to commit a crime at the time of his *initial* decision to remain in the dwelling. Put differently, petitioner treats (Pet. 14) "remaining in" under *Taylor* as a precise moment in time when the length or circumstances of a defendant's presence first render it unpermitted, and petitioner would require the formation of criminal intent at that time. See Pet. 24-25. But "[n]either the dictionary definition nor the common usage," *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1632 (2017), of the word "remain" supports that reading, see, *e.g.*, *Webster's Third New International Dictionary* 1919 (1993) (defining "remain" as to be "still extant, present, or available"). The Michigan statute criminalizes "burglary" under *Taylor* because it applies when a defendant develops the intent to commit a crime while he continues to be present in a dwelling without authorization.

Petitioner further argues (Pet. 25) that giving "remaining in" its common meaning "renders *Taylor*'s 'unlawful entry' language superfluous." But regardless of how the mens rea requirement is interpreted, the reference to unlawful entry is necessary to make clear that a defendant can commit burglary when either his entry or his continued presence after entry is unlawful. Nor is petitioner correct (Pet. 21-22) that treating "remaining in" as a discrete event is "most faithful to ACCA's purpose." Contrary to petitioner's view (Pet. 22-23), no

greater "inherent potential for harm to persons" exists when a defendant enters or initially remains in a building or structure with the intent to commit a crime, as compared to developing that intent later. *Taylor*, 495 U.S. at 588. *Taylor* recognized that a surprise encounter between an occupant and an intruder increases the "possibility of a violent confrontation" on either side. *Ibid.* Neither the homeowner nor the burglar is less likely to respond with violence simply because the burglar developed the intent to commit a crime only after his initial trespass.

2. Although the court below correctly resolved the question presented, its decision implicates a circuit conflict that warrants resolution by this Court.

The Fourth and Ninth Circuits, like the court of appeals here, hold that a statute corresponds to *Taylor*'s generic definition of burglary if it requires that a defendant "develop[] the intent to commit the crime while remaining in the building, even if he did not have it at the moment he entered." *United States* v. *Bonilla*, 687 F.3d 188, 194 (4th Cir. 2012) (determining that a conviction for burglary under Texas Penal Code Annotated § 30.02(a)(3) (West 2011) constitutes a conviction for burglary under the ACCA), cert. denied, 134 S. Ct. 52 (2013); see *United States* v. *Reina-Rodriguez*, 468 F.3d 1147, 1155 (9th Cir. 2006) ("*Taylor* allows for burglary convictions so long as the defendant formed the intent to commit a crime while unlawfully remaining on the premises, regardless of the legality of the entry."), overruled on other grounds, *United States* v. *Grisel*, 488 F.3d 844 (9th Cir.) (en banc), cert. denied, 552 U.S. 970 (2007).[2]

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[2] Petitioner states (Pet. 18) that in *United States* v. *Dunn*, 96 Fed. Appx. 600, cert. denied, 543 U.S. 949 (2004), the Tenth Circuit held that the intent to commit a crime may be formed at any point while

By contrast, the Fifth and Eighth Circuits have held that ACCA burglary requires that the defendant intend to commit a crime at the time of his initial entry or decision to remain in a building or structure without authorization. The Fifth Circuit recently decided the issue in en banc proceedings, considering the same Texas burglary statute at issue in the Fourth Circuit's decision in *Bonilla*, *supra*. *United States* v. *Herrold*, 883 F.3d 517, 531-536 (5th Cir. 2018); see *United States* v. *Bernel-Aveja*, 844 F.3d 206, 214 (5th Cir. 2016); *United States* v. *Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (per curiam); *United States* v. *Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007). The Eighth Circuit similarly determined in *United States* v. *McArthur*, 850 F.3d 925 (2017), that "a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." *Id.* at 939. Given that the Fifth Circuit has addressed the issue en banc, and the Eighth Circuit denied the government's request for rehearing en banc in *McArthur*, see 2/24/17 Order (No. 14-3335), the conflict is unlikely to be resolved without this Court's intervention.[3]

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the defendant is unlawfully present in a building or structure. The court of appeals' unpublished decision in *Dunn* does not squarely address the question presented. Its conclusion that Texas Penal Code § 30.02(a)(3) (West 1992) constitutes generic burglary under *Taylor* relies entirely on the court's prior opinion in *United States* v. *Spring*, 80 F.3d 1450 (10th Cir. 1996), which considered a challenge to the statute's locational element and did not address when a defendant must form the intent to commit a crime, *id.* at 1462. See *Dunn*, 96 Fed. Appx. at 605.

[3] The Seventh Circuit will soon address whether Minnesota burglary qualifies as generic ACCA burglary—the same question resolved by the Eighth Circuit in *McArthur*. See *Van Cannon* v. *United States*, No. 17-2631 (7th Cir. Argued Jan. 18, 2018).

The question presented is important because burglary is a frequently recurring ACCA predicate. And this case presents a suitable vehicle for resolving the question, which the court of appeals addressed in a published opinion. See Pet. App. 1a-8a. Although two other pending petitions for writs of certiorari raise the same question, see *Ferguson* v. *United States*, No. 17-7496 (filed Jan. 17, 2018); *Secord* v. *United States*, No. 17-7224 (filed Dec. 19, 2017), each presents a less suitable vehicle. The district court in *Ferguson* determined that the petitioner was convicted of a specific variant of Tennessee burglary that would qualify as generic burglary under any circuit's interpretation of *Taylor*, *supra*; the petitioner in *Ferguson* is thus unlikely to benefit from a decision in his favor on the question presented. And *Secord* arises from the court of appeals' unpublished denial of a certificate of appealability. This Court should therefore grant the petition for a writ of certiorari in this case and hold the petitions in *Ferguson* and *Secord* pending its disposition of this case.

3. In the alternative, this Court may wish to hold the petition in this case pending its disposition of the government's petition for a writ of certiorari in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017). *Stitt* presents the question whether burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. If the Court grants certiorari in *Stitt* and resolves that question, its decision may provide guidance on the proper scope of ACCA burglary and the question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's disposition of the petition for a writ of certiorari in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017), and then be disposed of as appropriate.

Respectfully submitted.

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MARCH 2018